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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Reserved on: September 24, 2012

Judgment Pronounced on: September 26, 2012

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W.P.(C) 3351/2011

PATIL VOSSLOH RAIL SYSTEMS PVT. LTD. Petitioner

Represented by: Mr.Raju Ramachandran, Sr.Advocate
instructed by Mr.R.K.Sanghi, Advocate.

versus

UNION OF INDIA & ORS

..... Respondents

Represented by: Mr.Rajeeve Mehra, A.S.G. instructed
by Mr.Kunal Kahol, & Ms.Preetika Dwivedi, Advocates
for UOI/Railways.

Ms.Indra Jai Singh, ASG with Mr.Sunil Kumar,
Advocate for UOI/Min. of U.D.

Mr.Raghavendra S.Srivastava, and Mr.Venkat
Subramaniam, Advocates for R-5.

Mr.Shiv Kumar, Advocate for R-6.

Mr.R.K.Handoo, Mr.Yoginder Handoo, and Mr.Aditya
Chaudhary, Advocates for R-7.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MANMOHAN SINGH

PRADEEP NANDRAJOG, J.

1. The petitioner claims to be a leading manufacturer of railway equipment including 'Fasteners for Ballastless Track' and supplies its product to Indian Railways and various Metro Rail Corporations. It alleges that under the Allocation of Business Rules, in exercise of power conferred

by Clause-3 of Article 77 of the Constitution of India, matters pertaining to Railways and Metro Railways have to be dealt with by the Ministry of Railways and no other Ministry. Petitioner further avers that on the subject of *'Performance Criteria of Fastening Systems for Ballastless Track'*, the Ministry of Railways has issued an Office Order dated May 21, 2010 enlisting thereunder 'PERFORMANCE CRITERIA OF FASTENING SYSTEM FOR BALLASTLESS TRACK ON METRO RAILWAYS/MRTS SYSTEMS', as per which, pleads the petitioner, a satisfactory performance record of minimum five years is required as an eligibility criteria to supply fastening equipment to Metro Railways for laying ballastless tracks. It is the case of the petitioner that if a new system is to be introduced in India for the first time, it has to be kept under observation of the Research Design Standards Organization (RDSO) for a period of two years.

2. The grievance is to a communication dated April 19, 2011 issued by the Ministry of Urban Development, in para 5 whereof, by way of clarification, it is written that the condition of provenness for five years is not a prerequisite for products that are referred to for examination by the Ministry of Railways/RDSO, and are approved. In a nutshell, petitioner claims that on the subject of supplying fastening system to Metro Railways, Ministry of Urban Development is not authorized to issue any clarification; and secondly it is urged that keeping in view the safety angle the standards prescribed by the Ministry of Railways as per its order dated May 21, 2010 cannot be diluted. On the reasoning aforesaid the clarificatory letter dated April 19, 2011 as also the consequential letter dated April 28, 2011 written by the Executive Director Works (Planning) in the Ministry of Railways to

respondent No.7, M/s.Pandrol Rahee Technologies Pvt. Ltd., has been sought to be got quashed, in which letter it has been communicated to respondent No.7 that its product 'Double Resilient Base Plate Assembly Fastening System' has been found technically suitable as per the requirement of the Performance Criteria with the need for RDSO to keep it under observation for two years.

3. We note the order dated May 21, 2010, pertaining to the Performance Criteria and its enclosure on which the petitioner places reliance. The two read as under:-

“No.2009/Proj/MAS/9/2

Dated 21.05.2010

General Managers,
All Indian Railways,

Director General,
RDSO,
Lucknow

Sub: Performance Criteria of Fastening System for
Ballastless Track

The Ministry of Railways has finalized the Performance Criterion of the fastening systems for ballastless track for Metro Railways/MRTS systems. These Performance Criterion will come into force with immediate effect.

Metro Railways/MRTS systems are free to choose fastening systems for ballastless track complying to these Performance Criterion.

They should however report the details of the fastening system adopted by them to the Ministry of Railways.

In case, a new system is introduced in the country for the first time, the same will be kept under observation by

RDSO for a period of two years in association with the concerned Metro railways/MRTS system.

In case any Metro railway or MRTS system wishes to deviate from these Performance Criterion, prior approval of Ministry of Railways would be necessary.

Sd/-
Rajiv Chaudhry
Executive Director Works (Planning)

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**PERFORMANCE CRITERIA OF FASTENING
SYSTEM FOR BALLASTLESS TRACK ON
METRO RAILWAYS/MRTS SYSTEMS
(PROVISIONAL)**

1. Purpose:

The performance criteria define the performance standard of fastening system for ballastless track of Metro Railway System. Apart from other things, the fastening system is required to moderate vibration and noise transmitted through the rail and to reduce the track stiffness and the impact on the track structure, so as to obtain the parameters as detailed in the ensuing paragraphs.

2.

3.

4. Performance Requirement of Fastening System:

4.1 General

- i) The fastening shall be designed to hold the two rails of the track strongly to the supporting structure in upright

position by resisting the vertical, lateral and longitudinal forces and vibrations.

ii) The fastenings shall be with a proven track record. Fastening System should have satisfactory performance record of minimum five years in service in ballastless track on any established railway system. In this regard, supplier should submit certificate of performance from user railways administration including proof of use of the fastening system.

iii) The fastening shall provide insulation to take care of return current of traction system.

iv) Fastening should satisfy the required performance norms as stated in para 4.2, 4.3, 4.4 & 4.5.”

4. Shorn of the prolix pleadings and annexures filed therewith resulting in the writ paper book running into 838 pages, we note that prior to March 30, 2010, the Performance Criteria stipulated by the Ministry of Railways was extremely time consuming. It had five steps. Step 1 was laboratory test on a product conducted by RDSO, and if successful, Step 2 was limited field trial for a period of six months to one year. If limited field trial was successful, Step 3 was the extended field trial up to two years or beyond. The data gathered had then to be discussed in the Trial Scrutiny Committee, this was Step 4. If the Trial Scrutiny Committee approved the product, reference was made to the Railway Board. This was Step 5. The Railway Board would then consider the entire matter and if everything was in order, would grant the necessary approval.

5. Realizing that the process afore-noted was cumbersome and in the changing global economic environment and technology improvements being fast and quick with new products being introduced in the world, a

decision was taken to eliminate Step 3 i.e. not to go in for any extended trial in respect of products **which have already been established and proven in an Organized Railway System abroad.** On March 30, 2010, the revised guideline, under the caption, ‘Technical Appreciation and Approval of Proven Track Fastening System’ was issued. It reads as under:-

**“GOVERNMENT OF INDIA
MINISTRY OF RAILWAYS
(RAILWAY BOARD)**

No.2009/Track-II/22/1/2

New Delhi,
dated 30.03.2010

The Executive Director/OA (Civil)
R.D.S.O.,
Lucknow

Sub:- Technical appreciation and approval of proven track fastening System.

Presently the introduction of new track fitting is done after the following five essential steps:-

1. Successful laboratory test conducted by RDSO.
2. Limited field trial generally for a period of six months to one year.
3. Extended field trial which may go on for two years or beyond.
4. Discussion in TSC.
5. Approval of the new product by Railway Board (Technical approval)

As per the above procedure. It takes a very long time for a new product to be introduced and Railway may loose to get the technological benefits of new and proven products in time. The scenario on Railway front in the entire world is changing very fast. New products are

being introduced in the entire world. It is therefore imperative that we may change the procedure for standardization and adoption of new material.

Accordingly it has been decided by Board to eliminate the step (3) above and not to go for any extended trial in respect of products which have already been established and proven in an organized Railway system abroad, the certification of which should be produced by the manufacturer from the client Railway.

Sd/-
(Satis Kumar)
Exc.Director Track(M)
Railway Board.”

6. It is thus apparent that post March 30, 2010, as per guidelines issued by the Ministry of Railways i.e. the concerned Ministry, the rules of the game have changed.

7. The stand of the contesting respondents on the issue may be noted with reference to the pleadings in the short affidavit filed to oppose the writ petition, and we eschew reference to the detailed counter affidavit filed, inasmuch as paragraphs 12 to 14 of the short counter affidavit meets the point. It reads as under:-

“12. The metro railways were permitted to select fastening system on their own which were fully compliant to the twin requirements of the Performance Criteria i.e. a fastening system which had rendered a performance for 5 years and the fastening system fulfilled the various technical requirements of the Performance Criteria. In such a case, they would not have the requirement to approach the Ministry of Railways for prior approval. In all other cases, where the chosen fastening system was not fully compliant to the Performance Criteria and was deviating from it, prior

approval of MoR was necessary.

13. Even at the risk of being repetitive, it is mentioned again that the need for proven-ness as satisfactory performance for five years was pre-requisite only when such a system was available and the metro railways decided to opt for such a fully compliant system and to avoid approaching Ministry of Railways (MoR) for prior approval of the fastening system. In case a fully compliant system was not available or due to other techno-economic reasons, the metro railways was willing to chose a system deviating from the twin criterion of the Performance Criterion, they had to approach Ministry of Railways for prior approval. At this stage it is important to allay any apprehension that the MoR policy ignores the need for ensuring safety as the policy is designed to provide a uniform, objective test result based criterion for selection and approval of fastening systems. This not only ensures that only those fastening system will get chosen which are safe for the Metro Railways to use but also promote competition amongst the present and other prospective suppliers and systems. Submissions made in Para 14 below are relevant in this regard. This consideration of safety being upper most while clearing the proposal for the double resilient base plate assembly system is evident from the submissions made in ensuring paras 14 & 17.

14. Incidentally in a global survey done by RDSO recently it has been learnt that there are several systems that may be keen to enter the Indian market. All these have a of provenness much more than 5 years but due to some modifications done may not fit in the category of provenness of 5 years. MoR will examine them in accordance with requirements of the Performance Criterion and take an appropriate view. In all this, there is no question of compromising with the issue of safety. A fastening system proven for several years may undergo some modification due to value engineering, usage of a

newly developed material, change in the working environments or the specific requirements of a particular project etc. This does not make that system as a whole doubtful, it is just that the system needs to be examined again in view of the modifications and a suitable view taken for which MoR is fully experienced, competent and authorized. It is in this context that the proposal cleared for the double resilient base plate assembly of M/s. Pandrol has met the tests result bench mark but in the present form has not put in a service of five years. This is modified version of a proven system which has put in more than fifteen years in Hong Kong and Singapore metro railways. Whereas, the fastening system 336, of which the petitioner is the only supplier at present, has done the service in track for five years but the test results for this system as per the Performance Criterion have not so far been supplied to the MoR for establishing its compliance to the technical requirements laid down in the Performance Criterion.” *(Underlining emphasized)*

8. Responding to the pleadings in paragraphs 12 to 14 of the short affidavit filed by respondents No.2 to 4, the petitioner pleaded as under:-

“12. With reference to para 12 it is submitted that the deponent of the respondent No.2 has taken a wrong interpretation with respect to the performance criterion in order to favour the respondent No.7. The interpretation of the deponent to the performance criteria is incorrect. It is incorrect that if a product have 5 years of provenness track record they need not come to Railway Board, if they do not have the provenness of 5 years they need to come to the Railway Board for evaluation wherein a dispensation of provenness or technical criterion can be given. This interpretation itself is wrong. As per the performance criterion the fastening system should have 5 years of performance track record. This is the observation of the Railway’s own Officer who has put it in right perspective. The relevant portion of the noting is reproduced herein below:

“No.2009/Proj./MAS/9/2 Voll II

S.No.1 & 2 Receipts

Sub: Track Fastening System for Ballastless Track

Ministry of Railways had issued Performance Criteria for fastening system for ballastless track vide S.No.1/4. As per Para 4.1(ii)

“The fastening shall be with a proven track record. Fastening System should have satisfactory performance record of minimum five years in service in ballastless track on any established railway system. In this regard, supplier should submit certificate to performance from user railways administration including proof of use of the fastening system.”

Further clarifications of Performance Criteria were issued vide S.No.1.

Ministry of Railways vide (S.No.1/2) had issued following clarifications. “If the metros decides to use double resilient base plate fastening system, the same can be used for length not exceeding 5km on one metro system and kept under monitoring by RDSO for 2 years under service conditions.”

Further, MoUD vide their letter dated 19.4.2011 had issued clarification of Performance Specification of fastening system which state that limitation of provenness for 5 years is not a pre-requisite in cases that are referred to and examined by the MoR/RDSO since in their examination they see all the technical aspects of the system and then take a decision on its use. The performance criteria laid down by Ministry of Railways only talks of proven track record in

terms of satisfactory performance for 5 years in service irrespective of the length of track on which the system has been laid. (S.No.2/1 refers)

In recent letters (S.No.2 & 3) addressed to MoUD and Board (ME) M/s Patil Rail Infrastructure Pvt. Ltd. has requested that it is not appropriate to relax the condition of 5 years provenness of fastening system as mentioned under para 5 of MoUD letter dated 19.4.2011.

Put up for consideration please.”

The deponent of the respondent No.2 hurriedly to favour the respondent No.7 without taking approval from the competent authority i.e. Railway Board Member Engineering has issued the letter dated 28.4.2011. The letter dated 7.10.2010 from the respondent No.4 RDSO to the respondent No.3 may be referred. In this letter the RDSO has submitted its comments on the fastening system of the respondent No.7 in the light of the performance criterion by stating that the respondent No.7 has not submitted the performance report of 5 years of the system proposed till now and details given by the respondent No.7 are not enough to evaluate the fastening system. Further in the letter dated 10.11.2010 the respondent No.4 RDSO has informed the respondent No.7 that as per clause 4.1 of the technical requirement the fastening system should have a satisfactory record of 5 years in service much in established Railway System and that the certificate of performance from the user Railway administration including the proof of use of fastening system is necessary certificate indicating all the parameters mentioned in the technical requirement of ballastless track and that the required certificate has not been submitted by the respondent No.7. Neither the Committee member were consulted nor the competent authority i.e. Member Engineering Railway Board were consulted before the issuance of the impugned

letters/clarification. A totally new stand has been taken by the deponent in his Affidavit.

13 to 15. With reference to paras 13 to 15 it is submitted that the interpretation given by the deponent in respect of the performance criterion is not a correct interpretation. The petitioner craves leave of this Hon'ble Court to refer to the said performance criterion for its true interpretation, meaning, scope and effect at the time of hearing. It is submitted that the performance criterion has been issued by a committee consisting of various experts and of which deponent was also a member. And therefore – Deponent could have raised his views in this committee. However after finalization of such performance criteria Deponent is just the administrator of such Performance Criteria/Policy. Any change in such criteria or policy has to be done by competent authority which is the Member of Engineering of the Railway Board and not the Deponent. It is further submitted and is important to take note of that Pandarol (Respondent No.7) themselves have many such fastening systems also there are other fastening systems from many other manufacturers which are having an experience of more than 5 years. The question is why they are not being evaluated and why only favouritism is being shown by the deponent towards the respondent No.7. It is further submitted that the performance criterion does not speak out with related modification of fastening. The performance criterion has to be followed in strict compliance and the same cannot be modified or relaxed to favour one particular company. It is denied that the fastening system offered by the respondent No.7 is the modified version which has put in more than 15 years in Hong Kong and Singapore. It is submitted that the fastening system proposed by the respondent No.7 is as used in Dubai Metro and Dubai Assembly has not completed the 5 years provenness as required in the performance criterion which will be cleared from the letter dated 9.12.2010 from the Director Track of

Railway to the deponent. As admitted by the deponent that the respondent No.7 has several products for ballastless track and many of them are proven products and it is pertinent to note that the respondent No.7 is not offering its proven product to India whereas the offering unproven product. It is submitted that when contract involves public interest the safety of public is paramount as public money would be expended for the purposes of contract. It is submitted that in a contract related to public the goods or services which are being commissioned for a public purpose should be for public utility. In such a case the public will be more interested in the quality of the product. If the quality is of poor standard it can lead to endanger the public safety. It is relevant to point out that several accidents have occurred while using the fastening system of the respondent No.7.”
(*Emphasis underlined*)

9. With reference to the pleadings, and the portions underlined, it is apparent that the plea on facts by respondents No.2 to 4 that global survey done by RDSO has revealed several systems, which have a provenness of much more than five years are keen to enter the Indian market, but due to some modifications done, may not fit in the category of provenness for five years has not been denied by the writ petitioner. The further stand, on a matter of fact, by the respondents that a fastening system proven for several years may undergo some modification due to value engineering, usage of newly developed material and change in the working environment or the specific requirements of a particular project and this does not make that system as a whole doubtful, has also not been denied. We shall be discussing this aspect of the pleadings a little later with respect to the legal inference which need to be drawn.

10. With reference to the order dated May 21, 2010 and the

Performance Criteria guidelines, contents whereof have been noted by us in paragraph 3 above, it simply needs to be highlighted by us that with reference to proven track record, the fastening system should have satisfactorily performance record of minimum five years in service in ballastless track on any established railway system, and this could be an established railway system even abroad, is the condition stipulated as per para 4.1(ii) of the PERFORMANCE CRITERIA. We highlight that the requirement is not with reference to an established railway system in India. The guideline dated March 30, 2010 eliminates extended field trial if the product offered has proven itself in an Organized Railway System abroad, and thus makes explicit what was earlier implicit.

11. The pleadings extracted by us herein above would evidence that the product offered by respondent No.7 has a proven record of more than 15 years in Hong Kong and Singapore Metro Railways; albeit the version offered in India is a modified version, and as we understand the same is a better version being the result of value engineering and use of newly developed material. From the pleadings of the parties, as noted by us, the writ petitioner does not dispute the product of respondent No.7 having proved its worth for more than 15 years in Hong Kong and Singapore Metro Rail Systems, but makes a grievance of the specific product offered not having proved its worth for five years, and highlights this to be the requirement of para 4.1(ii) of the Performance Criteria. But, as we have noted herein above, it is the stand of the respondents that systems proven for several years undergo modifications due to value engineering, use of newly developed material or change in the working environments and this does not make the system as a whole doubtful. It just needs a microscopic

examination, keeping in view the modifications, to determine suitability and for which the Research Design Standards Organization (RDSO) is the competent body. Under the circumstances it hardly matters what is written by the Ministry of Urban Development in its letter dated April 19, 2011, which we find is a letter written in the course of exchange of communication between various Metro Rail Corporations in India and the Ministry of Urban Development, and as regards the letter dated April 28, 2011, it simply records that the Double Resilient Base Plate Assembly Fastening System of respondent No.7 has been found to be technically suitable as per the requirement of Performance Criteria and would be kept under observations for two years as per the need of RDSO. The letter reads as under:-

“No.2003/Proj/Bangalore/2/2 (Pt) Dated: 28.04.2011
M/s.Pandrol Rahee Technologies Pvt. Ltd.
107, Lakhinarayan Talla Road, Shalimar,
Howrah – 711103 W.B.

Sub: Proposal for approval of Pandrol Double Resilient Baseplate Assembly through MoUD for use on BLT.

Ref. : Your letter No.PRT/KNA/RLY.BD/11/SDM dt. 14.3.2011.

Reference your letter above, it is clarified that the proposed Double Resilient Base Plate Assembly Fastening System of M/s.Pandrol for ballastless track, sent to Ministry of Railways through the Ministry of Urban Development has been found technically suitable as per the requirement of the Performance Criteria with the need for RDSO to keep it under observation for two years.

The above has also been advised to Ministry of Urban Development who has mentioned this in their letter

No.K-14011/21/2009-MRTS dated 19.4.2011, a copy of which is enclosed.

Sd/- (*illegible*)
Executive Director Works (Planning)”

12. Indeed, whether a new product, which is the result of advancement in technology or is the result of some value engineering or uses newly developed material, would be equivalent to an existing product which has proven its credentials on being used for more than five years in an organized Metro Railway System, is a matter of expert opinion and this opinion, unless demonstrably and palpably found to be tainted, in that ignores the known scientific principles accepted by the experts in the field, is immune to a judicial scrutiny.

13. To put it simply, we find that the requirement of the guideline dated March 30, 2010 issued by the Ministry of Railways has been fully complied with. The product of respondent No.7 has successfully cleared the laboratory test conducted by RDSO and has an established provenness in an organized railway system abroad. It would be kept under observations for two years. All the requirements of guidelines framed on the subject by the Ministry of Railways have been complied with, and it is not that the Ministry of Urban Development has diluted the guideline.

14. We may note that it is the case of the respondents that the petitioner has a monopoly in India and thus every endeavour should be made, while not compromising with safety, to ensure a healthy competition by having more than one bidder. The respondents further allege that even the first entry in the Indian market by the petitioner was with respect to a product, provenness whereof was not proved with reference to the identical

product used in organized Metro Rail System for more than five years. But, we refrain from expressing any opinion thereon inasmuch as there are no pleadings to said effect.

15. The writ petition is dismissed with costs as per the Rules of this Court.

(PRADEEP NANDRAJOG)
JUDGE

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 26, 2012
dk